OCT 7 19
CHARLES ELMORE C
C

FILE COPY

No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1931

HARRY BLOCKBURGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Discussion	3
Appendix	6–7

CITATIONS

Cases:

Ballerini v. *Aderholt*, 44 F. (2d) 352 — 4

United States v. *Daugherty*, 269 U. S. 360 — 4

Statutes:

Harrison Narcotic Act, c. 1, 38 Stat. 785, 786, 789—

Sec. 1, as amended by the Revenue Act of 1926, c. 27, 44 Stat. 9, 97 (U. S. C., Title 26, Sec. 692) — 6

Sec. 2 (U. S. C., Title 26, Sec. 696) — 6

Sec. 9 (U. S. C., Title 26, Sec. 705) — 6

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 374

HARRY BLOCKBURGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the granting of the petition for certiorari but suggests that the Court limit its review to the questio[illegible]ated below.

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 60), one judge dissenting (R. 65), is reported in 50 F. (2d) 795.

JURISDICTION

The judgment sought to be reviewed was entered June 11, 1931. (R. 68–69.) The petition for cer-

tiorari was filed September 11, 1931. Although he does not so state, petitioner presumably invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

We suggest that the Court limit its review to the following question:

Whether a single sale of narcotics not in or from the original stamped package, and not in pursuance of a written order of the purchaser upon a blank form provided for that purpose by the Commissioner of Internal Revenue, is punishable only as one offense.

The other questions raised by petitioner are not of sufficient importance to warrant review by this Court on certiorari.

STATUTES INVOLVED

The pertinent provisions of the Harrison Narcotic Act are printed in the Appendix, *infra*, pages 6–7.

STATEMENT

The indictment in this case contained five counts. Petitioner was convicted under the second, third, and fifth counts. (R. 9.) The second count (R. 4) charged a sale on May 28, 1929, and the third (R. 4–5) a sale on May 29, 1929, of morphine hydrochloride not in or from the original stamped package. The fifth count (R. 6) charged a sale on the

latter date of morphine hydrochloride not in pursuance of a written order by the purchaser upon a blank form supplied for that purpose by the Commissioner of Internal Revenue. The second and third counts were based upon Section 1 of the Harrison Act as amended by the Revenue Act of 1926. (*Infra*, p. 6.) The fifth count was based upon Section 2 of the Harrison Act. (*Infra*, p. 6.) Petitioner was sentenced to serve five years' imprisonment and to pay a fine of $2,000 upon each count on which he was convicted, the terms of imprisonment to run consecutively. (R. 10.) On appeal the conviction was affirmed (R. 60–64), one judge dissenting (R. 65).

DISCUSSION

The evidence contained in the bill of exceptions shows three distinct sales of narcotics made successively on May 27, 28, and 29, 1929. (R. 11–15.) The court below treated the sale of May 29th as supporting the charges contained in the third and fifth counts of the indictment. (R. 62.) On each of these counts the maximum punishment prescribed by the Harrison Act (Sec. 9, *infra*, pp. 6–7) of five years' imprisonment and a fine of $2,000 was imposed, the terms of imprisonment to run consecutively. (R. 10.) The petitioner contends that a single sale of narcotics constitutes but one offense, even though such sale may violate different provisions of the Harrison Act. He therefore argues that the punishment for a single sale may not ex-

ceed the maximum prescribed in the statute, and that his sentence upon conviction under the third and fifth counts was not authorized by law. The dissenting judge in the court below agreed with petitioner's view. (R. 67.) The majority of the court were of the opinion, however, that two offenses resulted from the sale, as it violated two separate provisions of the Act and as the same evidence would not support conviction for both violations. It therefore held that double punishment for one offense did not result from the sentence imposed. (R. 62–63.) In so holding the majority recognized that their decision was in conflict with that of the Circuit Court of Appeals for the Fifth Circuit in *Ballerini* v. *Aderholt*, 44 F. (2d) 352 (R. 63), and the dissenting judge expressed the hope that "this conflict in decisions * * * may be authoritatively resolved" (R. 68).

As there appears to be a conflict between the two decisions, we do not oppose a review of this question.

Petitioner's contention that the three sales of narcotics which were proved constituted, in effect, but a single transaction is, we submit, without merit. The sales were consummated on successive days, and we submit that the fact that the sales were made to the same individual instead of to different persons does not distinguish the case from *United States* v. *Daugherty*, 269 U. S. 360, which is controlling.

The other contentions urged by petitioner are sufficiently disposed of in the opinion below. They present no questions of general importance and do not warrant review on certiorari.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1931.

APPENDIX

HARRISON NARCOTIC ACT

Sec. 1, as amended by the Revenue Act of 1926, c. 27, 44 Stat. 9, 97; U. S. C.; Title 26, Sec. 692, so far as pertinent, provides:

* * * * * *

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; * * *

Sec. 2 (c. 1, 38 Stat. 785, 786; U. S. C., Title 26, Sec. 696) provides in part as follows:

> That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. * * *

Section 9 (38 Stat. 789; U. S. C., Title 26, sec. 705) provides:

> That any person who violates or fails to comply with any of the requirements of this

Act shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

NOV 21 1931
CHARLES ELMORE CROPLEY
CLERK

No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1931

HARRY BLOCKBURGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Summary of argument	4
Argument:	
I. The sentence imposed was permitted by law	5
II. Reversible error was not committed in permitting the cross-examination of which petitioner complains	14
III. The judgment should not be reversed on account of the remarks made by the prosecuting attorney during his closing argument	20
IV. There is no merit in the petitioner's exception to a portion of the charge of the District Court to the jury	22
Conclusion	24
Appendix	25–26

CITATIONS

Cases:	
Albrecht v. *United States*, 273 U. S. 1	6
Alford v. *United States*, 282 U. S. 687	16–18
Alston v. *United States*, 274 U. S. 289	9
Ballerini v. *Aderholt*, 44 F. (2d) 352	11
Burton v. *United States*, 202 U. S. 344	6
Chadwick v. *United States*, 141 Fed. 225	21
Copperthwaite v. *United States*, 37 F. (2d) 846	11
Dunlop v. *United States*, 165 U. S. 486	21
Ebeling v. *Morgan*, 237 U. S. 625	6
Gavieres v. *United States*, 220 U. S. 338	6
Gay v. *United States*, 8 F. (2d) 219	21
Haggerty v. *United States*, 52 F. (2d) 11, No. 460, October Term, 1931	11
Higgins v. *United States*, 185 Fed. 710	21
King v. *United States*, 280 U. S. 521	6, 7, 8
Luterman v. *United States*, 281 Fed. 374, certiorari denied, 260 U. S. 732	21
Morgan v. *Devine*, 237 U. S. 632	6
Nigro v. *United States*, 276 U. S. 332	9, 10
Raffel v. *United States*, 271 U. S. 494	18

Cases—Continued Page

Silkworth v. *United States*, 10 F. (2d) 711, certiorari denied, 271 U. S. 664 22

United States v. *Daugherty*, 269 U. S. 360 12

Vendetti v. *United States*, 45 F. (2d) 543 22

Statutes:

Harrison Narcotic Act, c. 1, 38 Stat. 785, 786, 789—

Sec. 1, as amended by the Revenue Act of 1926, c. 27, 44 Stat. 9, 97 (U. S. C., Title 26, Sec. 692) 25

Sec. 2 (U. S. C., Title 26, Sec. 696) 25

Sec. 9 (U. S. C., Title 26, Sec. 705) 25–26

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 374

HARRY BLOCKBURGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury appears at R. 29–35. The opinion of the Circuit Court of Appeals (R. 60) and the dissenting opinion (R. 65) are reported in 50 F. (2d) 795.

JURISDICTION

The judgment to be reviewed was entered on June 11, 1931. (R. 68–69.) Petition for certiorari was filed on September 11, 1931, and granted on November 2, 1931 (R. 70), pursuant to Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The following questions are presented:

1. Whether a single sale of narcotics not in or from a stamped package, and not in pursuance of a written order of the purchaser upon a blank form provided for that purpose by the Commissioner of Internal Revenue, is punishable as two offenses.

2. Whether two sales of narcotics not in or from a stamped package, which sales were made to the same purchaser on consecutive days, constitute two offenses.

3. Whether prejudicial error was committed in permitting cross-examination of petitioner, who was the defendant below charged with unlawful sale of narcotics, as to his acquaintance and association with certain narcotic addicts.

4. Whether prejudicial error was committed in permitting cross-examination of a witness called by the defendant as to whether he was a surety on the bond of a man charged with violating the Narcotic Act.

5. Whether certain remarks made by the District Attorney in his summing up require a reversal of the conviction.

6. Whether a portion of the charge of the court to the jury constituted prejudicial error.

STATUTES INVOLVED

The pertinent provisions of the Harrison Narcotic Act are printed in the Appendix, *infra*, pages 25–26.

STATEMENT

The indictment in the case contained five counts. Petitioner was convicted under the second, third, and fifth counts only. (R. 9.) The second count (R. 4) charged a sale to Ella Rush on May 28, 1929, and the third (R. 4–5) a sale to Ella Rush on May 29, 1929, each sale being of morphine hydrochloride not in or from the original stamped package. The fifth count (R. 6) charged a sale to Ella Rush on the latter date of morphine hydrochloride not in pursuance of a written order by the purchaser upon a blank form supplied for that purpose by the Commissioner of Internal Revenue. The second and third counts were based upon that portion of Section 1 of the Harrison Act, as amended by the Revenue Act of 1926, which is printed on p. 25, *infra*. The fifth count was based upon that portion of Section 2 of the Harrison Act which is printed on p. 25, *infra*. Petitioner was sentenced to serve five years' imprisonment and to pay a fine of $2,000 upon each count on which he was convicted, the terms of imprisonment to run consecutively and the fines to be cumulative. (R. [illegible]0.) On appeal the judgment was affirmed (R. 68–69), with one judge dissenting (R. 65).

The evidence contained in the bill of exceptions shows three distinct sales of narcotics to Ella Rush, one on May 27, another on May 28, and another on May 29, 1929 (R. 11–15), but the court below treated the one sale on May 29th as supporting the

charges contained in the third and fifth counts of the indictment (R. 62), and we do not challenge the propriety of this view.

SUMMARY OF ARGUMENT

I

The sentence imposed was permitted by law. "The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes." Here, although the same sale was the basis for conviction under the third count and the fifth count, different evidence was required for each. In order to sustain the conviction under the third count under Section 1 of the Act, evidence was required that the package was not stamped, and to sustain the conviction under the fifth count under Section 2, evidence was required that the sale was not made upon the form of order prescribed by the Commissioner.

As the other count upon which the petitioner was convicted, the second count, charged, and was sustained by proof of, a sale made on the day before the sale which is the basis of the third and fifth counts, it was proper to impose a separate sentence on this second count. Two separate sales to the same persons on different days must be treated as

separate offenses, even though part of a "continuous performance."

The language of Section 9 of the Act "that any person who violates or fails to comply with any of the requirements of this Act shall, on conviction," be fined or be imprisoned, or both, must be construed to prescribe a separate penalty for each violation of the statute, even if two violations of the statute are consummated by the same act.

II

Reversible error was not committed in permitting the cross-examination of which the petitioner complains.

III

The judgment should not be reversed on account of the remarks made by the prosecuting attorney during his closing argument.

IV

There is no merit in the petitioner's exception to a portion of the charge of the District Court to the jury.

ARGUMENT

I

THE SENTENCE IMPOSED WAS PERMITTED BY LAW

The petitioner contends that the law authorized the imposition of not more than five years' imprisonment and a $2,000 fine as the maximum sen-